IN THE

Supreme Court of the United States

.....TERM.....

No. 694

LUZON BROKERAGE CO., INC., *Petitioner*,

versus

PUBLIC SERVICE COMMISSION AND V. FRAGANTE, AS DIRECTOR OF THE BUREAU OF PUBLIC WORKS, *Respondents*.

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of the Philippines in the case of Luzon Brokerage Co., Inc. *vs.* Public Service Commission and V. Fragante, as Director of Public Works, denying a petition for a writ of prohibition to restrain the Public Service Commission from requiring the petitioner to obtain a certificate of public convenience and the Director of Public Works from refusing to register its motor trucks unless petitioner presents a certificate of public convenience.

The judgment of the Supreme Court of the Philippines was rendered on June 25, 1940 (R. 71). A motion for reconsideration was filed on July 11, 1940 (R. 73), and was denied on August 1, 1940 (R. 108). Final judgment was entered on August 5, 1940 (R. 108).

Statement of the Matter Involved

This proceeding involves the correctness of the decision and judgment of the Supreme Court of the Philippines denying the petition for a writ of prohibition against the defendants.

For approximately twenty-seven years the petitioner has been engaged in the customs brokerage business in Manila. Said business involves the receiving, storage, and/or forwarding and delivery of goods and cargo which are received from ships in the port of Manila consigned to clients of petitioner; and in connection with this business, and as a necessary incident thereto, the petitioner maintains and operates a fleet of motor trucks used exclusively for the carriage of such goods and cargo received from ships and delivered to petitioner's clients. These trucks do not serve the general public and are used only to transport goods and cargo from the piers at Manila to the clients of petitioner as customs broker (R. 3 and 23).

In the year 1932, in another case between exactly the same parties, the Supreme Court of the Philippines decided that this business of petitioner (the operation of motor trucks as above set forth) is not a public utility or service (57 Phil. 536).

The business of petitioner is conducted exactly the same now as it was in the year 1932 and the years prior thereto (R. 3 and 23).

The law of the Philippines defining a public utility or service was amended ultimately by Commonwealth Act No. 454 so that a public service includes any individual, corporation, etc., operating any of certain businesses therein mentioned, "with general or *limited clientele*, whether permanent, occasional or accidental, * * *". This Act took effect on June 8, 1939 (Commonwealth Act 454) (R. 4 and 61).

Sixteen days later, or, on June 24, 1939, the Public Service Commission notified petitioner that its autotruck service is now "included and considered as a public service" by virtue of the provisions of Sec. 1 of Commonwealth Act 454, and petitioner was required to file an application before the Commission for the issuance of a certificate of public convenience to operate such autotruck freight service within thirty days; and petitioner was further notified that failure to comply with this requirement within the time specified would be considered as a violation of the provisions of Commonwealth Act No. 146, as amended (R. 5). This requirement was reiterated again under date of August 8, 1939 (R. 6) and again on October 25, 1939 (R. 8), with the further advertence that the "Commission will take the necessary action in accordance with the provisions of Commonwealth Act No. 146, as amended."

Also, under date of October 19, 1939, the Director of Public Works, who is in charge of the motor vehicle registration in the Philippines, advised petitioner that he would "require the Luzon Brokerage Company to present a certificate of public convenience from the Public Service Commission before accepting the re-registration of the company's "TC" trucks next year" (R. 9).

The proposed action of these two branches of the government would have put the petitioner out of business at the end of the year so far as the transportation of goods and cargo of its clients was concerned, if it did not obtain a certificate of public convenience, because without the certificate the trucks could not be registered, and could not operate on the streets of Manila.

Thereupon, on November 8, 1939, the petitioner filed a verified petition in an original action before the Supreme Court of the Philippines, praying that a preliminary injunction be issued and that, after hearing,

judgment be entered commanding the respondents to desist or refrain from requiring the petitioner to obtain a certificate of public convenience or refusing to register petitioner's motor trucks as private trucks; and that petitioner be granted such other and further relief as might be just and equitable in the premises (R. 1-12). This action was brought under the provisions of Secs. 226-230 of the Philippine Code of Civil Procedure, Act 190 (Vol. I, Public Laws of Philippine Commission, 414).

In this petition it was alleged:

> "9. That if according to the provisions of Commonwealth Act No. 454, the petitioner is required, as maintained by the Public Service Commission, to obtain a certificate of public convenience before continuing the operation of its business, then the said Act is unconstitutional as it would deprive the petitioner of its rights and property without due process of law, because the business of petitioner is in truth and in fact a private business and not a public service or public utility; and if petitioner is not so required according to the provisions of Commonwealth Act No. 454, then and in that case the action of the Commission is obviously illegal; and in either case, it is without or in excess of its jurisdiction." (R. 10).

The preliminary injunction was granted (R. 13) but after argument and submission of written memoranda the Court rendered judgment denying the petition.

In the decision under review the Court simply held that under the provisions of Commonwealth Act No. 454 the business of petitioner is a public service; and passed over without mentioning the question of the constitutionality of Commonwealth Act No. 454 which had been raised and extensively argued:

Statement of Question Involved

The question involved is the constitutionality of Commonwealth Act No. 454.

Petitioner's Contention

The petitioner contends that Commonwealth Act No. 454 is unconstitutional because by legislative fiat it attempts to make a public service that which in truth and in fact is not a public service or utility.

Reasons for Granting the Writ

This case presents a situation wherein the Philippine Supreme Court has failed to squarely decide a constitutional question and by its action permits the local authorities to enforce a law which petitioner contends is unconstitutional.

WHEREFORE, it is respectfully prayed that this petition for a writ of certiorari to review the judgment of the Supreme Court of the Philippines in this case be granted.

Manila, Philippines, November 22, 1940.

L. D. LOCKWOOD,
Attorney for Petitioner.

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LUZON BROKERAGE CO., INC., *Petitioner,*

versus

PUBLIC SERVICE COMMISSION AND V. FRAGANTE, AS DIRECTOR OF THE BUREAU OF PUBLIC WORKS, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion Below

The opinion below has not yet been officially reported. It is found on pages 71-73 of the Record.

Jurisdiction

Judgment of the Philippine Supreme Court in this case was rendered on June 25, 1940 (R. 71) and final judgment was entered on August 5, 1940 (R. 108). Exception and notice of intention to apply for writ of certiorari to the Supreme Court of the United States was filed on August 6, 1940 (R. 109).

The jurisdiction of this Court is invoked under the Act of Congress of February 13, 1925, c. 229, Sec. 7, and especially under the Act of Congress of March 24, 1934,

(48 Stat. at L. 456, 462) entitled "An Act to Provide for the Complete Independence of the Philippine Islands, to Provide for the Adoption of a Constitution and a Form of Government for the Philippine Islands, and for Other Purposes", Sec. 7 (6) reading as follows:

> "Review by the Supreme Court of the United States of cases from the Philippine Islands shall be as now provided by law; and such review shall also extend to all cases involving the constitution of the Commonwealth of the Philippine Islands."

This is a case "involving the constitution of the Commonwealth of the Philippine Islands."

Statement of the Case

The case is sufficiently stated in the Petition.

Specification of Error to be Urged

The Supreme Court of the Philippines erred in failing to find that Commonwealth Act No. 454 is unconstitutional.

ARGUMENT

Constitutional Provisions

Art. III, Sec. 1, of the Constitution of the Commonwealth of the P. I. provides:

> "ARTICLE III—BILL OF RIGHTS
>
> SECTION 1. (1) No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.
>
> (2) Private property shall not be taken for public use without just compensation." (R. 54).

This, of course, is not new law in the Philippines. We have had a Bill of Rights in the Philippines ever since civil government was established under American sovereignty. It is found in the original Philippine Organic Act, the Act of Congress of July 1, 1902, entitled "An

Act Temporarily to Provide for the Administration of the Affairs of the Civil Government in the Philippine Islands and for Other Purposes". (Sec. 5).

It was reenacted in the Act of Congress of August 29, 1916 entitled "An Act to Declare the Purpose of the People of the United States as to the Future Political Status of the People of the Philippine Islands and to Provide a More Autonomous Government for those Islands" (Sec. 3) (39 Stat. at L. 545).

And in the Act of March 24, 1934, wherein Congress provided for the formulation and adoption of a Philippine Constitution, it provided, in Sec. 2 thereof, certain "mandatory provisions" which that constitution must contain, the first of which is:

> "SEC. 2. (a) The constitution formulated and drafted shall be republican in form, shall contain a bill of rights, and shall, either as a part thereof or in an ordinance appended thereto, contain provisions to the effect that, pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands—"

In Cincinnati Soap Co. *v.* United States (301 U. S. 308, 81 L. ed. 1122) your Honorable Court mentioned:

> "The power of review by this court over Philippine cases, as now provided by law, is not only continued, but is extended to all cases involving the Constitution of the Commonwealth of the Philippine Islands."

So far as we know, this is the first case brought up to your Honorable Court "involving the Constitution of the Commonwealth of the Philippine Islands."

Local Law

The first public utility law in the Philippines was Act of the Philippine Legislature No. 2307, enacted

December 19, 1913 (9 Public Laws of Philippine Islands, 134). It defined a public utility as follows:

> "The term 'public utility' is hereby defined to include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control within the Philippine Islands any steam railroad, street railway, traction railway, canal, express, subway, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone, telegraph system, plant, or equipment *for public use*, under privileges granted or hereafter to be granted by the Government of the Philippine Islands or by any political subdivision thereof. (Italics ours.) (Sec. 14. R. 27).

By Act 2362 the definition was amended by including some other businesses and excluding plants of the Insular or Federal Governments but no fundamental change was made and the term "for public use" was retained (9 Public Laws of the Philippine Islands, 364, Sec. 10. Quoted R. 27).

The law was again amended by Act 2694 where motor vehicles were first included and the Manila Railroad, having been purchased by the government, was excepted, but the words "for public use" were used the same as previously (12 Public Laws of the Philippine Islands, 190, Sec. 9. Quoted R. 29).

The next legislation was Act 3108 which was a general revision of the Public Utility Law repealing all previous laws. There is no substantial change of definition of a public utility and the words "for public use" are used the same as before (18 Public Laws of the Philippine Islands, 213, Sec. 13. Quoted R. 30-31).

Act 3108 was amended by Act 3316. Here the term "public service" was substituted for "public utility" and

public service was defined practically the same as public utility except the words "for public use" were eliminated and "for hire or compensation" substituted (22 Public Laws of the Philippine Islands, 46, Sec. 6. Quoted R. 31-32).

It was after this law had been enacted that the Public Service Commission first took steps to bring the herein petitioner under its control and supervision as a public service, and as a result, the petitioner brought prohibition proceedings before the Philippine Supreme Court and that Court had the following to say with regard to this change in the law:

> "1. *Common Carriers: Public Service Commission; Jurisdiction over Private Enterprises.*—Although the petitioner has been operating its trucks in connection with its business as customs broker for approximately twenty years last past, it does not appear that the Public Utility Commission undertook to assume any jurisdiction over the operation of said trucks prior to the amendment of the Public Service Act by Act No. 3316, which took effect on December 4, 1926, or that there was any attempt to subject said business to regulation under Acts Nos. 2307, 2362 or 2694 with relation to the regulation of public utilities. The respondents and the Government of the Philippine Islands did not regard said trucks as common carriers or a public utility, as defined in said Acts.
>
> "2. *Id.; Id.; Id.*—There being no difference in the character or operation of petitioner's business since the amendments made by Act No. 3316, it follows that if said amendatory Act now embraces said business a material extension and enlargement of the business previously subject to the jurisdiction of the commission was accomplished by the amendments. But it was not the intention of the Legislature, in making some verbal changes in the previous act, to enlarge the supervision, regulation and control of the Public Service Commission so as to include

business like that described in this case. The operation of the petitioner's auto-trucks is no more a common carrier business since Act No. 3316 took effect than it was before.

"3. *Id.; Id.; Id.; 'Public Service', Defined.*—The mere omission from section 13 (Act No. 3108) of the phrase 'for public use' in the definition of a public service does not warrant the inference that the Legislature meant to extend the jurisdiction of the Public Service Commission to private enterprises not devoted to public use. The idea of public use is implicit in the term 'public service'. A public service is a service for public use. Public service is a stock phrase found in most definitions of a common carrier and a public utility. The Legislature, in the verbal amendments made by Act No. 3316 in section 13, did not contemplate the radical change which would discard the element of public use as an essential feature of every public service.

"4. *Id.; Id.; Id.; Legislature's Intent.*—Had the Legislature intended to bring under the jurisdiction of the Public Service Commission enterprises not operated for public use, it would not have left these enterprises to guess their way through a statute applicable to public utilities, at their peril and with 'no standard of conduct that it was possible to know". The Legislature could not have intended to leave such a cloud upon a statute." (57 Phil. 536-537.)

This was the last legislation regarding public services or utilities enacted by the former Philippine Legislature, although a draft of a proposed law carefully prepared by a committee appointed by the last Governor General of the Philippines had been submitted to the Legislature. After the constitution of the Philippine Commonwealth this draft was enacted into law by the National Assembly as Commonwealth Act No. 146, approved November 7, 1936. Here both the terms "for hire or compensation" and "for public use or service"

are used. (Commonwealth Act No. 146, Sec. 14. Quoted R. 33-34. The Commonwealth laws have not yet been bound and published in permanent book form so we can make reference only by the numbers of the Acts.)

It will now be observed that in four Acts of the Philippine Legislature (Nos. 2307, 2362, 2694 and 3108) covering a period from 1913 to 1926, "for public use" was the distinguishing characteristic or controlling test of a public utility. In other words, if a business enumerated in the law were operated "for public use", it would be a public utility and came under the supervision and control of the Public Utility Commission; and if not operated "for public use" it would not be a public utility and the Commission had no supervision or control over it.

In Act No. 3316 a change was made in the phraseology, the words "for hire or compensation" being substituted "for public use"; but the Supreme Court of the Philippines held, as above quoted, that the Legislature intended no substantial change in the law by this change in the wording.

Then came Commonwealth Act No. 146 and here both terms were used, "for hire or compensation" and "for public use or service"; in other words, the businesses mentioned in the law had to be operated both for hire or compensation *and* for public use or service in order to be a public service and come under the jurisdiction of the Public Service Commission.

Then came the law, the validity of which we now question, amending Commonwealth Act No. 146, completely revising and changing the carefully worded definition of Commonwealth Act No. 146 and defining "public service" as follows:

> "The term 'public service' includes every person that now or hereafter may own, operate, manage, or control in the Philippines, *for hire or*

compensation, with general or limited clientele, whether permanent occasional or accidental, and done for general business purposes, any common carrier, railroad, street railway, traction railway, sub-way, motor vehicle, either for freight or passenger, or both, with or without fixed route and whatever may be its classification, freight or carrier service of any class, express service, steamboat, or steamship line, pontines, ferries, and small water craft, engaged in the transportation of passengers and freight, shipyard, marine railway, marine repafir shop, warehouse, wharf, or dock, ice plant, ice-refrigeration plant, canal, irrigation system, sewerage, gas, electric light, heat, and power, water supply and power, petroleum, sewerage system, telephone, wire or wireless telegraph system and broadcasting radio stations". (Italics ours.) (Commonwealth Act No. 454, Sec. 1. R. 35.)

Decision Below

Petitioner contended in the court below that this law, Commonwealth Act No. 454, is unconstitutional; that by the elimination of the words "for public use" and by the use of the words "limited clientele", "occasional or accidental", private businesses which in truth and in fact were not public services were converted into public services and brought under the control and supervision of the Public Service Commission; and that owners of such businesses were thus deprived of their property without due process of law and without compensation.

Lengthy oral and written arguments and numerous authorities were submitted to the Court on this point. Petitioner's written argument and authorities are found on pages 36-55 of the Record and respondents' on pages 62-70.

For reasons unknown to petitioner, the Supreme Court of the Philippines passed over this question, practically the only question in the case, without mentioning

it. The case is practically decided in the following few words:

> "Act No. 454 is clear insofar as it includes in the definition of a public service that which is rendered for pay, although it is exclusively limited to the petitioner's customers." (R. 72).

Question Involved and Authorities

We, therefore, submit that the lower court erred in failing to hold that Commonwealth Act No. 454 is unconstitutional.

It so happens here that in the previous case between the same parties (57 Phil. 536-537 *supra*) the Philippine Supreme Court found and decided that the transportation business of the petitioner is *not a public service.* That is *res judicata.* And notwithstanding that the burden of the argument of the Solicitor General of the Philippines below was that the said business is a public service, we submit that that question is settled and cannot be reopened.

But there is no doubt but that under the terms of Commonwealth Act No. 454, petitioner's business would be a public service because it does operate motor vehicles for freight, for a limited clientele, for general business purposes.

We therefore have the concrete proposition of a private business being converted into a public service by legislative definition. The law on this subject is summarized by Corpus Juris as follows:

> "In a number of jurisdictions particular businesses or enterprises have been declared by constitution or statute to be public utilities. Such provisions, however, must be read in connection with the subject matter to which they relate, and are to be construed as applying only to such properties as have in fact been devoted to a public use, and not as

an effort to impress with a public use properties which have not been devoted thereto: for whether or not a given business, industry, or service is a public utility, does not depend upon legislative definition, but upon the nature of the business or service rendered, and an attempt to declare a company or enterprise to be a public utility, where it is inherently not such, is, by virtue of the guaranties of the federal constitution, void wherever it interferes with private rights of property or contract. So a legislature cannot by mere fiat or regulatory order, convert a private business or enterprise into a public utility, and the question whether or not a particular company or service is a public utility is a judicial one, and must be determined as such by a court of competent jurisdiction; but in reaching a conclusion the public policy of the state as announced by the legislature will be given due weight, and the determination of the legislature that a particular business is subject to the regulatory power, because the public welfare is dependent upon its proper conduct and regulation, will not lightly be disregarded by the courts. (51 C. J., p. 5.)

In Frost *vs.* Railroad Commission, 271 U. S. 583, 70 L. ed. 1101, which is squarely in point, this Honorable Court held:

> "A private carrier cannot be converted against his will into a common carrier by mere legislative command.
>
> A private carrier is unconstitutionally deprived of his property without due process of law by the state requiring him to become a public carrier, in order to secure a permit to use the public highways for transportation purposes."

Petitioner also relies on:

Smith *vs.* Cahoon, 283 U. S. 553, 75 L. ed. 1264;
The Michigan Public Utilities Commission *v.* Duke, 266 U. S. 570, 69 L. ed. 445;

Producers Transportation Co. *v.* Railroad Commission, 251 U. S. 228, 64 L. ed. 239.

Also:

Associated Pipe Line Co. *vs.* Railroad Commission, 176 Cal. 518; 169 Pac. 62;
Denciger & Co. *vs.* Public Service Commission, 275 Mo. 483.

The case of the De Pauw University *vs.* Public Service Commission of Oregon, 246 Fed. 183, is very interesting as it refers to an incidental business:

> "A company engaged in selling lands owned by it, and as an incident of the sale furnishing water for irrigation and domestic use to the purchasers, and no others, at a fixed contract rate, is not a public utility, and therefore not subject to regulation by the Oregon Public Service Commission."

The trucking business of the petitioner in this case was merely incidental to its business as a customs broker.

Previous rulings of the Supreme Court of the Philippines about what constitutes a public utility are found in U. S. *vs.* Tan Piaco, 40 Phil. 853, and Iloilo Ice and Cold Storage Co. *vs.* Public Utility Board, 44 Phil. 551.

Explanatory Note

A word of explanation may be in order regarding the repeated use of the letters "TC" in the record with reference to motor trucks. After more than one kind of motor vehicle came into use, the Bureau of Public Works, in charge of motor vehicle registration in the Philippines, established the system of distinguishing the kind of motor vehicle for which a number plate is issued by a capital letter preceding the registration number. Thus, ordinary private owned automobiles have no distinguishing letter. Ordinary private owned trucks have the letter "T" before the number. Trucks which have been converted

into buses and are operated by authority of the Public Service Commission have the letters "TPU", meaning "Truck Public Utility." Freight trucks for hire as public services are distinguished by the letters "TH", meaning "Truck Hire". Of later years the private hire contract truck has come into use and the Bureau adopted the letters "TC" to distinguish this, meaning "Truck Contract." The trucks of the herein petitioner were thus registered as "TC" trucks. After the enactment of Commonwealth Act No. 454, the Director of Public Works, believing that under the provisions of that law all contract trucks would be brought under the jurisdiction of the Commission, proposed to abolish the "TC" registration and required all owners of contract (TC) trucks to present certificates of public convenience from the Public Service Commission before the trucks could be registered. They intended to register them as "TH" trucks. Petitioner's contention is that if the "TC" registration is abolished its trucks should be registered as "T" trucks because they are privately owned and privately operated and not operated as a public service. Final action is being held in abeyance pending final outcome of this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ herein applied for should issue as prayed for and that the judgment of the Supreme Court of the Philippines in this case should be reversed.

Manila, Philippines, November 22, 1940.

Respectfully submitted,

L. D. LOCKWOOD,
Attorney for Petitioner.